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In the Supreme Court of the United States

October Term, 1940.

GEORGE DIXON, JAMES COLE, HARVEY H. HESS, EDWARD A. TYRONE AND W. A. MYATT, *Petitioners.*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Petition for Writ of Certiorari, and Brief in Support of Petition.

FRANK HICKMAN,
Tulsa Oklahoma,
Attorney for Petitioners.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1940.

No. .....

GEORGE DIXON, JAMES COLE, HARVEY H. HESS, EDWARD A. TYRONE AND W. A. MYATT, *Petitioners.*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI.*

The question involved in this controversy is whether or not a delegation of power by Congress to a selected instrumentality in the Executive Department may by such selected instrumentality be in turn delegated to and exercised by another instrumentality in the Executive Department.

The essential facts out of which this controversy arose are these:

The petitioners were officials, agents and employees of Southwestern Distilled Products, Inc., a licensed wholesale liquor dealer, located at Sulphur Springs, Arkansas, during the year 1939. As such they were subject to the provisions of section 2857, title 26, United States Code Annotated, section 2857, Internal Revenue Code, 1939, which reads as follows:

> "Every rectifier and wholesale liquor dealer shall keep daily, at his place of business covered by his spe-

cial tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records; *Provided*, that the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The record shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.

"The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

"Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

"Every rectifier and wholesale liquor dealer who refuses or neglects to render transcripts or summaries in the form required by the Commissioner, with the approval of the Secretary, shall, upon conviction, be fined not more than $100 for each such neglect or refusal."

The petitioners were charged by indictment, containing forty-eight counts, in the United States District Court for

the Western District of Arkansas, with violation of the foregoing section, and were found guilty as charged in twenty-nine counts, nineteen counts having been dismissed.

George Dixon was sentenced to pay a fine of $21,750.00 and to imprisonment for a period of eight years; James Cole was sentenced to pay a fine of $5,000.00 and to imprisonment for a period of four years; Harvey H. Hess was sentenced to pay a fine of $2,900.00 and to imprisonment for a period of two years; Edward A. Tyrone was sentenced to pay a fine of $500.00 and to imprisonment for a period of fifteen months; W. A. Myatt was sentenced to pay a fine of $500.00 and to imprisonment for a period of fifteen months.

All counts in the indictment were identical in their nature, the only difference being as to the dates, names and addresses. In substance, the indictment charged that the petitioners, being officers, agents and employees of Southwestern Distilled Products, Inc., a corporation engaged in the business of a wholesale liquor dealer in Sulphur Springs, Benton County, Arkansas, under authority of a United States special tax stamp, did unlawfully, knowingly, wilfully, fraudulently, and feloniously make false entries in the records required by law to be kept by said corporation of the distilled products disposed of by said corporation in that they did sell to named persons certain quantities of whiskies, gin and grain alcohol, a record of such sales having been made by petitioners on commercial invoices, on which invoices entries were made showing sold to a certain person at a certain address, thereby purporting to show and state that said spirits had been sold to such person who resided at and had a place of business at said address, which entries were false in that the liquor had not been sold to such person or that such person did not have a place of business or reside in such city, or at said address but resided at an address in a city in the State of Oklahoma or the State of Kan-

sas, naming it, all of which was known to the petitioners at the time of making said false entries in said invoices.

The invoices were on printed forms and were filled in by writing the date, name and address of purchaser with his vehicle license, number of cases and brands of liquor, serial number of cases and price. At the bottom of the form was printed an affidavit required to be executed by the purchaser or his agent. Photostats of this form appear on pages 111 and 113 of the record submitted herewith. That invoice was the basis of count one of the indictment.

The Soutwestern Distilled Products, Inc., was required to keep a record of all transactions involving the sale of liquor from its store for which its stamp had been issued. These records were required to be kept in accordance with the rules and regulations prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury and kept on forms prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury. The Commissioner, with the approval by the Secretary of the Treasury, had prescribed rules and regulations governing the conduct of the business of a wholesale liquor dealer, which rules and regulations are set forth and form a part of Form 338, which report is required to be made monthly by each wholesale liquor dealer to the District Supervisor of the Alcohol Tax Unit, showing a recapitulation of all merchandise received and disposed of during the month. The rules and regulations required that a wholesale liquor dealer keep a record on Form 52, which form allows for the recording of all liquors received and all liquors disposed of daily by the wholesale liquor dealer. Form 52 is divided into two parts, one called 52-A and one called 52-B. On Form 52-A the wholesale liquor dealer was required to record within twenty-four hours after the transaction occurred a record of all receipts of liquor in the place of business, showing the

distillery or manufacturer, with its address, the brand of the liquor, proofage, the quantity and date received. On Form 52-B, the wholesale liquor dealer was required to record the name and address of the consignee to whom the liquor was sent, the brand thereof, the quantity and the proofage and the serial number of the individual cases of liquor. The rules as disclosed on Form 338 provide that a wholesale liquor dealer could omit the writing of the serial numbers on Form 52-B, provided such serial number, together with other identifying data, was kept on a commercial invoice, to be approved in form by the District Supervisor of the Alcohol Tax Unit.

The petitioners were not charged with making false entries on Form 52-A or Form 52-B or Form 338, but they were charged with making false entries as to names and addresses of consignees on their commercial invoices. These invoices were required to be retained by the petitioners at their place of business with Forms 52-A and 52-B whereas Form 338 was required to be filed with the District Supervisor of the Alcohol Tax Unit. There was no evidence that the form of invoices on which the alleged false entries were made was prescribed by the Commissioner and/or approved by the Secretary, but the evidence disclosed that the form was prepared by the petitioners and submitted to the district supervisor for approval and that he aproved same.

At the trial the evidence showed that in each instance covered by the several counts in the indictment the address or the name of the consignee was untrue but that in each instance the invoice was written up as to name and address in accordance with the directions of the purchaser of the liquor shown to have been sold on such invoices. Over the objection of petitioners the court admitted in evidence the various invoices corresponding with the various counts of the indictment, the objection being that such forms were

not forms prescribed by the Commissioner and approved by the Secretary, and were therefore not forms the falsification of which was condemned by section 2857, *supra*.

At the close of the evidence of the government the petitioners demurred thereto and moved the court to instruct the jury to acquit the petitioners and upon the close of all the evidence the petitioners renewed their motion for an instructed verdict of not guilty, both of which were overruled and exceptions allowed.

Upon appeal to the Circuit Court of Appeals for the Eighth Circuit this question was advanced and the sole contention made that, because the form of commercial invoices on which the alleged false entries were made lacked prescription by the Commissioner and approval by the Secretary, as provided by the Act of Congress, the false entries made upon the invoices were therefore not false entries denounced by the section. The appellate court affirmed the judgment of the trial court, the opinion of that court being submitted herewith in the transcript of record as required by the rules of this court.

It is respectfully submitted that the learned trial judge was in error and that the Eighth Circuit Court of Appeals was likewise in error in affirming the judgment of the trial court, and that this court should grant a writ of *certiorari* for review of this record, in support whereof we submit a brief on the questions of law involved.

FRANK HICKMAN,
Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

The question involved herein may be reduced to the following proposition:

The penalties prescribed by section 2857, U. S. C. A., cannot be imposed for making false entries except on forms prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, and making false entries on commercial invoices, the form for which was not prescribed by the Commissioner and approved by the Secretary, does not constitute a violation of section 2857, U. S. C. A.

We do not contend that the Act of Congress, under which petitioners were prosecuted, delegating to the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the power to make rules and regulations and to prescribe forms regulating the business of wholesale liquor dealers, is unconstitutional. We believe that in the act in question the Congress has declared a policy with respect to the subject, and may therefore confer upon administrative officers the "power to fill up the details" by prescribing administrative rules and regulations to promote the purpose of the legislation and to carry it into effect. See:

United States v. *Goldsmith,* 91 F. (2d) 893;
United States v. *Tishman,* 99 F. (2d) 951.

We further concede that the courts take judicial notice of rules and regulations of administrative departments, upon which have been conferred that power by an Act of Congress, when such rules and regulations are prescribed in

accordance with the will of Congress as disclosed by the act delegating the power.

—*Dominici* v. *United States,* 72 Fed. 46.

It is our contention that the Congress has delegated the power upon the Commissioner, subject to the approval of the Secretary of the Treasury, to prescribe rules and regulations and to establish the forms upon which the records of a wholesale liquor dealer shall be kept, but that the prosecution proved that the form of record on which the alleged false entries were made was not prescribed by the Commissioner and was not approved by the Secretary. On the contrary it appeared that the form of invoice was not even submitted to the Commissioner or the Secretary for approval, but was a form of record submitted to and approved by the District Supervisor of the Alcohol Tax Unit only. Therefore, our question is whether the power delegated by the Act of Congress to the Commissioner to prescribe rules and forms, with approval of the Secretary, can in turn be delegated by the Commissioner to a District Supervisor of the Alcohol Tax Unit, and the approval by the Secretary dispensed with.

The act under consideration provides:

> "* * * The records shall be kept and the transcript shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe. * * * Every rectifier and wholesale liquor dealer who refuses and neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary * * * or makes any false entry therein * * * shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000 and be imprisoned not less than three months nor more than three years. * * *"

The rules prescribed by the Commissioner, and approved by the Secretary, were established at the trial by the

introduction of Form 338 (R., p. 119), whereon they appear under the heading: "Instructions for Wholesale Liquor Dealers." These rules prescribe that every wholesale liquor dealer shall keep Record 52 and render monthly transcripts on Form 52A and 52B and monthly summary on Form 338; that entries shall be made on Record 52 as indicated by the headings on the various columns and in accordance with those instructions, not later than the close of business on the day on which the transactions occur; that under the heading "Address" on Record 52 there shall be entered the town or city and state, and if a city, the street and number, of the person from whom received or to whom sent; that "*the wholesole liquor dealer need not enter on Record 52, part 2 (Form 52B) serial numbers of cases of distilled spirits removed from his premises, provided that he keeps in his place of business a separate record, approved by the District Supervisor, showing such serial numbers with necessary identifying data, including the date of removal and the name and address of the consignee. Such separate record may be kept in book form (including loose-leaf books) or may consist of commercial papers, such as invoices or bills.* Such books, invoices and bills shall be preserved for a period of 4 years and in such a manner that the required information may be readily ascertained therefrom and during such period, shall be available during business hours for inspection and the taking of abstracts therefrom by government officers." (Italics ours own.) The rules further prescribed that the wholesale liquor dealer shall prepare a full and complete transcript of Record 52 and Forms 52A and 52B and a summary report on Form 338 and forward them to the District Supervisor, Alcohol Tax Unit, on or before the 10th day of the succeeding month.

It will be noted that the petitioners were not charged with having failed to keep Record 52 or Forms 52A or 52B

or Form 338, as required by the rules, or that they made any false entry therein. It is to be further noted that they were not charged with falsifying on the invoices the serial numbers of cases of distilled spirits disposed of by them.

On the very day that Southwestern Distilled Products, Incorporated, commenced business at Sulphur Springs, on April 18th, 1939, there was filed with the Division of the Federal Registry, Treasury Department decision number 4896, which was promulgated April 17th, 1939, which decision, in part, said:

> "Internal Revenue forms prescribed by the Commissioner of Internal Revenue and specifically approved by the Secretary of the Treasury, applicable under any provision of law on the date of the enactment of the Internal Revenue Code, * * * are hereby prescribed and made applicable under the provisions of the Code * * * in so far as any such form is not inconsistent with the Code."

That decision was adopted for the purpose of conforming the Internal Revenue Code adopted by Congress on February 10th, 1939, to the Internal Revenue forms theretofore prescribed in accordance with the rules and regulations previously adopted under the authority of section 2857 shortly after its enactment.

We submit that when the Congress delegates to administrative officers in the Executive Department the power to adopt rules and regulations to effect the objects and purposes disclosed in the Act, and limits the exercise of such delegated power, such as was done in the instant case by requiring the approval thereof of the Secretary of the Treasury, such rules and regulations must be adopted in the manner prescribed by the Congress. In other words, by the very act under consideration the power delegated to the Commissioner is limited to the extent that his action must be ap-

proved by the Secretary of the Treasury. Indeed, the Secretary, by the decision above quoted from, has followed the will of Congress by requiring the specific approval by him of Internal Revenue forms prescribed by the Commissioner. Here we find no approval of the forms of invoices, on which the alleged false entries were made, by the Secretary. In fact it was agreed by the parties that the form itself was not prescribed by the Commissioner or approved by the Secretary, but was prepared by the petitioners themselves and approved by the District Supervisor. If the power delegated by Congress can be thus in turn delegated to another, and the approval by the Secretary thus dispensed with, is there any limit to which officers of the Internal Revenue Department can go? If the power delegated to the Commissioner can be by him delegated to a Supervisor in respect to the prescribing and approval of Internal Revenue forms, without approval by the Secretary, why cannot the power delegated to the Commissioner to prescribe rules and regulations subject to the approval of the Secretary, be delegated to the Supervisor and the approval of the Secretary entirely dispensed with?

In *A. L. A. Schechter Poultry Corporation* v. *United States,* 295 U. S. 495, 79 L. ed. 1570, this court held that Congress may not delegate or transfer to others essential legislative functions, but that the Constitution does not deny to Congress necessary resources of flexibility and practicability, which will enable it to perform its functions in laying down policies and establishing standards, while leaving to *selected* instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by Congress is to apply.

In *Wallace* v. *Currin,* 95 F. (2d) 856, affirmed by this court in 306 U. S. 1, 83 L. ed. 441, the court held that Congress may leave to *selected instrumentalities* the making of

subordinate rules within prescribed limits and the determination of facts to which the policy prescribed by Congress is to apply.

In *Panama Refining Company* v. *Ryan,* 293 U. S. 388, 79 L. ed. 446, this court said:

> "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicability which will enable it to perform its functions in laying down policies and establishing standards, while leaving to *selected instrumentalities* the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply." (Italics our own.)

In *Wayman* v. *Southard,* 10 Wheat. 1, 43, 6 L. ed. 253, 262, this court said:

> "A general provision may be made, the *power given to those who are to act* under such general provisions to fill up the details." (Italics our own.)

In *J. W. Hampton, Jr., & Co.* v. *United States,* 276 U. S. 394, 407, 72 L. ed. 624, 629, the court said in part:

> "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive, or, as often happens, in matters of state legislation, it may be left to a popular vote of the residents of a district to be affected by the legislation."

In *Buttfield* v. *Stranahan,* 192 U. S. 470, 48 L. ed. 525, the court upheld the validity of an Act of the Congress conferring authority upon the Secretary of the Treasury to establish uniform standards of purity, quality and fitness

for consumption of all kinds of teas imported into the United States.

In *St. Louis I. M. and S. R. Co.* v. *Taylor,* 210 U. S. 281, 52 L. ed. 523, the court upheld the act conferring upon the Secretary of War the power to determine whether bridges and other structures constitute unreasonable obstructions to navigation and to specify and prescribe the structural changes that are required.

It will thus be seen that in the above cited cases, as well as in the act under consideration here, the Congress selected the instrumentality upon which it conferred the power to prescribe rules and regulations and to adopt forms. That instrumentality is selected. The power thus conferred upon the Commissioner however is circumscribed to the extent that his action in carrying out the power delegated must be approved by the Secretary.

If the Commissioner, in exercising the delegated power, can delegate the duty on him to another executive officer and dispense with the approval of the Secretary as required by the act, as was done in the case at bar, then it follows that the powers conferred on the Secretary of the Treasury, the Interstate Commerce Commission and the Secretary of War in the cases above cited could be by those selected instrumentalities delegated to other instrumentalities.

An extensive search of the authorities has failed to reveal a decision of any court on the precise question involved here. In none of the adjudicated cases dealing with questions of delegated powers has there been advanced a contention that the exercise of such powers was contrary to the manner prescribed by the act for their exercise. We believe this case to be the first in which this question is involved. We submit that, inasmuch as the Congress has limited the administrative officers in performing the duties delegated to

them to the subjects mentioned in the act itself, likewise should the exercise of those powers be limited to the specific instrumentalities named by the Congress in the act to perform them. In other words, where the Congress has specifically chosen the officer, vested in him the delegated power, and provided that his action shall be subject to the approval of another administrative officer, the power cannot be exercised by a third officer selected by the former and the approval of the latter dispensed with. This is exactly what was done in the case at bar. We find that the Act of Congress placed in the Commissioner of Internal Revenue the duty of adopting rules and regulations and prescribing forms, subject to the approval of the Secretary of the Treasury. We further find that the power to adopt the form which is the subject-matter of this prosecution was in turn delegated by the Commissioner to the District Supervisor of the Alcohol Tax Unit, in whom was vested the exclusive power of approval of the form. We further find that the Secretary, in whom was delegated by Congress the power to approve the form, did not approve the same; in fact, the same was never submitted to him for approval or disapproval.

The indictment charged that the petitioners made false entries "in the records required by law to be kept" by the corporation of which they were officers, agents or employees. Section 2857, *supra,* provides that the wholesale liquor dealer shall keep his records in such form and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe, and that if he refuses to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or makes any false entry therein, he shall be subject to the punishment prescribed in the act. We submit that until it is shown that the record alleged to be falsified was a record prescribed by the Commissioner and approved by the Secretary it is not a

record required by law to be kept. If our contention cannot be sustained then it would be possible for the District Supervisor to delegate the power vested in him by the Commissioner to a Deputy District Supervisor, who in turn could delegate the power to some investigator in his office, and so on *ad infinitum*.

Respectfully submitted,

FRANK HICKMAN,
Attorney for Petitioners.

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CITATIONS

Statute:

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 768

GEORGE DIXON, JAMES COLE, HARVEY H. HESS, EDWARD A. TYRONE, AND W. A. MYATT, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 132–144) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 16, 1941 (R. 145). The petition for writ of certiorari was filed February 18, 1941. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules of this Court, promulgated May 7, 1934.

QUESTIONS PRESENTED

1. Whether the invoices in which the petitioners made false entries were "records required to be kept" under the provisions of Section 2857, Internal Revenue Code, 1939, and the regulations issued pursuant thereto.

2. If under Section 2857 the petitioners could be held criminally responsible for the false entries only if the form of the invoices was prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, an alternative question is whether this requirement was satisfied.

STATUTE AND REGULATIONS INVOLVED

Section 2857, Internal Revenue Code, 1939 (U. S. C., Supp. V, Title 26, Section 2857), provides:

> (a) Requirements.—Every rectifier and every wholesale liquor dealer who sells, or offers for sale, distilled spirits in quantities of five wine-gallons or more to the same person at the same time shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: *Provided,* That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and

under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.

The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, *or makes any false entry therein,*[1] or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

Every rectifier and wholesale liquor dealer who refuses or neglects to render

[1] The charges against the petitioners were based upon this clause.

> transcripts or summaries in the form required by the Commissioner, with the approval of the Secretary, shall, upon conviction, be fined not more than $100 for each such neglect or refusal. [Italics supplied.]

Instruction No. 5 of the "Instructions for Wholesale Liquor Dealers" appearing on Form 338 (R. 119, 142)[2] provides that:

> The wholesale liquor dealer need not enter on Record 52, part 2 [Form 52B],[3] serial numbers of cases of distilled spirits removed from his premises: Provided, That he keeps in his place of business a separate record, approved by the District Supervisor, showing such serial numbers with necessary identifying data, including the date of removal and the name and address of the consignee. Such separate record

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[2] Form 338 is a monthly report required to be made by a wholesale liquor dealer to the District Supervisor of the Alcohol Tax Unit showing a recapitulation of all merchandise received and disposed of during the month.

[3] As stated by the Circuit Court of Appeals in its opinion (R. 139): "Form 52 is divided into two parts, one called 52–A and one called 52–B. On Form 52–A the wholesale liquor dealer was required to record within twenty-four hours after the transaction occurred a record of all receipts of liquor in the place of business, showing the distillery or manufacturer with its address, the brand of the liquor, proofage, the quantity and date received. On Form 52–B, the wholesale liquor dealer was required to record the name and address of the consignee to whom the liquor was sent, the brand thereof, the quantity and the proofage, and the serial number of the individual cases of liquor * * *."

See these Forms at R. 115, 117.

may be kept in book form (including loose-leaf books) or may consist of commercial papers, such as invoices or bills. Such books, invoices, and bills shall be preserved for a period of 4 years and in such a manner that the required information may be readily ascertained therefrom, and, during such period, shall be available during business hours for inspection and the taking of abstracts therefrom by Government officers.

Entries shall be made on such separate record not later than the close of business of the day on which the transactions occur. The wholesale liquor dealer, whose separate record has been approved by the District Supervisor, shall note in Record 52, part 2, column 13, that "Serial numbers shown on commercial records, per authority dated * * *."[4]

STATEMENT

On January 25, 1940, an indictment in forty-eight counts was returned against the petitioners and others in the District Court for the Western District of Arkansas (R. 8–66). Each count, differing only as to dates, names, and addresses, in substance charged that the petitioners and others, being officers, agents, and employees of Southwestern Distilled Products, Inc., a corporation

[4] It is conceded that these rules and regulations were lawfully prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury (Pet. 4; opinion below, R. 142, including footnote 2 thereon).

engaged in the business of a wholesale liquor dealer, made a false entry in a record of sales of distilled spirits required by law to be kept by the corporation, to wit, a commercial invoice or invoices. The entry falsely represented the name and address or the address of the person to whom the liquor was sold.

Each of the petitioners was found guilty on twenty-nine counts (R. 72–79), nineteen of the counts having been dismissed by the Government at the close of the evidence (R. 71). Sentences were imposed accordingly (R. 79–87).[5] The convictions were unanimously affirmed by the Circuit Court of Appeals for the Eighth Circuit (R 132–144).

The evidence, which the parties stipulated to be the "uncontroverted facts" (R. 92), is set forth in full in the opinion of the Circuit Court of Appeals (R. 134–141). The petitioners do not question that the evidence is amply sufficient to sustain their convictions if their conduct in making the false entries in the commercial invoices came within the prohibition of Section 285, *supra*, p. 3.

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[5] The five petitioners were sentenced as follows (R. 79–87): Dixon, a fine of $21,750 and imprisonment for eight years and two days; Cole, a fine of $5,000 and imprisonment for four years; Hess, a fine of $1,000 and imprisonment for two years; Tyrone, a fine of $500 and imprisonment for fifteen months; Myatt, a fine of $500 and imprisonment for fifteen months.

ARGUMENT

I

Petitioners assert that the form of the invoices in which the false entries were made had never been prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.[6] (Pet. 8). They contend that there can be no offense of making a false entry under Section 2857 of the Internal Revenue Code unless the false entry is made on a form so prescribed and approved (Pet. 7).

This contention disregards the plain language of the statute. In its first clause the statute provides that every wholesale liquor dealer who sells, or offers for sale a certain quantity of distilled spirits to the same person at the same time "shall keep daily * * * a record of distilled spirits received and disposed of by him." By a proviso in the same paragraph it is required that "The records shall be kept * * * in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe."

The second paragraph of the section provides that "The records required to be kept under the provisions of this section and regulations issued

[6] The form of the invoices, they say, was designed by themselves and was approved only by the District Supervisor of the Alcohol Tax Unit (Pet. 11).

pursuant thereto" shall be preserved for a certain period and during such period shall be available for inspection, etc.

The third and fourth paragraphs of the section are the penalty paragraphs. The third, the paragraph here involved, first provides that every wholesale dealer "who refuses or neglects to keep such records" i. e., records required to be kept under the provisions of the section and regulations issued pursuant thereto, "in the form prescribed by the Commissioner, with the approval of the Secretary," shall be punished. Petitioners were not charged, however, with failing or refusing to keep records in the prescribed form. They were charged, in each count, under a later clause of the paragraph which penalizes every wholesale liquor dealer who "makes any false entry therein," that is, "in such records,"—"the records required to be kept under the provisions of this section and regulations issued pursuant thereto."

It is obvious that such clause is not at all concerned with whether a form has been prescribed by the Commissioner for the record in which the false entry is made. The only requirement is that a false entry be made in a record required to be kept. The first paragraph of the section requires the wholesaler to keep a daily record of distilled spirits disposed of. And there can be no doubt that under Instruction No. 5 (*supra,* pp. 4–5) the wholesaler is required to keep commercial invoices and anal-

ogous records showing the serial numbers of cases of distilled spirits removed from his premises, "with necessary identifying data, including the date of removal and the name and address of the consignee," where he does not desire to enter the serial numbers of cases on Form 52B. It is conceded that this regulation is valid. Consequently, we submit, it is not open to dispute that the commercial invoices in which the false entries were made were "records required to be kept under the provisions of [the] section and regulations issued pursuant thereto" and that petitioners were properly convicted for making those false entries.

II

Even if the section be construed as punishing the making of false entries only where they are made on forms prescribed by the Commissioner with the approval of the Secretary, the forms of the commercial invoices in the instant case were, it would seem clear, so prescribed and approved. The proviso in the first paragraph of the section merely states that "The records shall be kept * * * in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe." This proviso does not require that, when the Commissioner exercises his discretion, he furnish specific forms nor does it compel him to descend into detail. A general description of what should be included in a particular

record is obviously enough. In Instruction No. 5 (*supra,* pp. 4–5), conceded to be valid, the Commissioner, with the approval of the Secretary, clearly and specifically stated the essential content of the separate record permitted to be kept by the wholesaler where he does not desire to enter on Form 52B the serial number of the cases of the distilled spirits sold by him. The instruction also provides that the "separate record may be kept in book form (including loose-leaf books) or may consist of commercial papers, such as invoices or bills." The content and the general form of the record were hence prescribed by the Commissioner and approved by the Secretary.

In the face of Instruction No. 5, it is clear that the power to prescribe the form of the separate record was not in anywise delegated to the District Supervisor of the Alcohol Tax Unit. As the Circuit Court of Appeals said (R. 144):

> There is no question here of the Supervisor having approved anything in the wholesaler's invoices other than those items of the forms which were specifically prescribed by the Commissioner with the approval of the Secretary. He did not assume to and did not exercise any legislative or regulatory power in merely checking the form of invoice with the prescribed requirements and approving the form that was obviously in compliance with the duly prescribed and approved requirements. * * *

There can be no doubt as to power of the Secretary to assign this ministerial duty to the Supervisor.[7]

The commercial invoices in which the false entries in the instant case were made were consequently, we submit, records the form of which was prescribed by the Commissioner with the approval of the Secretary.

CONCLUSION

The case was correctly decided below and there is involved no conflict of decisions or any important question of federal law. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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[7] Section 3170 of the Internal Revenue Code provides that: "The Secretary is authorized to confer and impose upon the Commissioner and any of his assistants, agents, or employees, and upon any other officer, employee, or agent of the Treasury Department, any of the rights, privileges, powers, duties, and protection conferred or imposed upon the Secretary, or any officer or employee of the Treasury Department, or by any law now or hereafter in force relating to the taxation, exportation, transportation, manufacture, possession, or use of, or traffic in, distilled spirits, wines, fermented liquors, or denatured alcohol." (53 Stat. 373.)

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